

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Insurance Producer's  
License of Gregory P. McWhorter,  
License No. IN52965

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on February 25, 2005, at the Office of Administrative Hearings. The record closed at the end of the hearing that day.

Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Department of Commerce (Department).

Gregory P. McWhorter, P.O. Box 22247, Minneapolis, MN 55422, appeared on his own behalf without counsel.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Murphy, Deputy Commissioner, Minnesota Dept. of Commerce, 85 Seventh Place E., Suite 500, St. Paul, MN 55101, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

**STATEMENT OF ISSUE**

The issues in this case are whether the Respondent's insurance producer's license is subject to discipline because the Respondent has:

(1) demonstrated untrustworthiness in violation of Minn. Stat. §§ 45.027, subd. 7, and 60K.43, subd. 1(8);

(2) improperly withheld, misappropriated, or converted funds received in the course of doing insurance business, in violation of Minn. Stat. § 60K.43, subd. 1(4);

(3) misrepresented the terms of an actual or proposed insurance contract or application for insurance, in violation of Minn. Stat. §§ 60K.43, subd. 1(8), or knowingly or willfully made a false or fraudulent statement relative to an application for insurance, in violation of Minn. Stat. § 72A.04;

(4) forged a document, in violation of Minn. Stat. § 60K.43, subd. 1(10);

(5) engaged in willful violations of law, in violation of Minn. Stat. § 72A.02;

(6) procured premiums through false representations, in violation of Minn. Stat. § 72A.03; or

(7) breached his fiduciary duties concerning client funds, in violation of Minn. R. 2795.1300.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. All Insurance is an insurance agency located in New Hope, Minnesota. It has sales offices in Anoka, Roseville, and Bloomington. Kevin Hardesty is the owner of All Insurance.<sup>[1]</sup>

2. From 1998 to December 27, 2004, the Respondent was the insurance producer in charge of the Bloomington sales office. Respondent is Hardesty's nephew. Respondent had an independent contractor relationship with All Insurance. By agreement with the Respondent, Hardesty paid the rent for the Bloomington office, but Respondent kept 100% of the commissions paid on policies sold by the office and any other revenue generated by the office. Respondent paid Hardesty a fixed sum every month for the rights to write automobile insurance policies under Hardesty's contracts with various insurers.<sup>[2]</sup>

3. The Respondent had one employee in the Bloomington sales office, an insurance producer named Erin Wakely. The Respondent instructed Wakely that she was to collect applications and premiums, but that he was to retain all responsibility for making deposits to the office bank account and for electronically initiating or renewing

coverage with the insurance companies (uploading the policies). Wakely's practice was to leave applications and premiums on Respondent's desk for him to handle when he was in the office. For reasons that are not clear from the record, Respondent was in the office only a few hours per week during 2004, often after the office was closed for the day. During the course of the year Wakely was often unable to find application-related paperwork in the office's general filing system.

4. On December 24, 2004, after finding three boxes of files in the Respondent's office containing applications for which no policy numbers had ever been filled in, Erin Wakely contacted Kevin Hardesty and expressed her concerns that Respondent had not forwarded premiums paid by these customers to the insurance companies. She brought the files to Hardesty that day, and he reviewed them. On December 27, 2004, Hardesty met with the Respondent, terminated Respondent's contract with All Insurance, and contacted the Department of Commerce.<sup>[3]</sup>

5. An investigator with the Department of Commerce reviewed the files pertaining to these customers. He and Hardesty jointly determined that during calendar year 2004, the Bloomington sales office received premium payments from approximately 80 different clients that were not forwarded to the insurance companies, creating situations in which the customers had paid for coverage they did not receive. Most often these customers had paid their premiums in cash. Some of these customers discovered the lack of coverage after having automobile accidents or receiving citations for being unable to prove that they had automobile insurance.

6. Based on the receipts in the files and information provided by Hardesty after contacting the insurance companies, these customers paid approximately \$36,000 in premiums that were not forwarded to the insurance companies. The payments made by these clients represent about 20% of the insurance premiums collected by the Bloomington sales office during 2004.<sup>[4]</sup>

7. On January 6, 2005, the Commissioner of Commerce issued a Notice of and Order for Hearing, Statement of Charges, and Order for Summary Suspension, setting a hearing date of February 4, 2005. At the Respondent's request, the hearing was continued to February 25, 2005.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 45.027, subd. 6, and 60K.43, subd. 2.

2. Respondent received due, proper and timely notice of the charges, and of the time and place of the hearing.

3. Minn. Stat. §45.027, subd. 7, authorizes the Commissioner to take disciplinary action against the license of a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner or who has engaged in an act or practice that demonstrates the licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the license granted by the Commissioner.<sup>[5]</sup>

4. The Commissioner may also take disciplinary action against an insurance producer's license for improperly withholding, misappropriating, or converting any money or properties received in the course of doing insurance business or for using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility.<sup>[6]</sup>

5. An agent who receives funds from a client in connection with an insurance transaction receives and holds those funds in a fiduciary capacity, pursuant to Minn. R. 2795.1300.

6. The Respondent has engaged in acts or practices that demonstrate he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified in violation of Minn. Stat. § 45.027, subd. 7(a)(4).

7. The Respondent has improperly withheld, misappropriated, or converted money received in the course of doing insurance business and demonstrated incompetence, untrustworthiness, or financial irresponsibility in violation of Minn. Stat. § 60K.43, subd. 1(4) & (8).

8. The Respondent breached his fiduciary duties concerning client funds, in violation of Minn. R. 2750.1300.

9. Disciplinary action against Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: that the Commissioner of the Minnesota Department of Commerce take disciplinary action against the Respondent's license.

Dated this 9<sup>th</sup> day of March, 2005.

s/Kathleen D. Sheehy  
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KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Tape recorded (one tape)

## **NOTICE**

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

The Respondent argued that there is no proof that he handled each of these transactions and no evidence of what happened to the funds. He is correct that the Department did not offer each file and each receipt documenting funds received from customers, because the record reflects that Erin Wakely typically received the funds and initialed the receipts. Nor did the Department offer evidence showing that the Respondent spent the funds or deposited them somewhere else. But that level of detail is not necessary on this record. The Respondent did not dispute that he was in charge of all funds flowing through the Bloomington sales office; that he had directed Wakely to forward all applications and premiums to him; that he was responsible for uploading all policies; that the files for these particular clients were found in his office; and that the payments reflected in the files were never forwarded to the insurance companies. This evidence is sufficient to conclude that the Respondent, at minimum, withheld funds received in the course of the insurance business; demonstrated incompetence, untrustworthiness, and financial irresponsibility on a rather large scale; and breached his fiduciary duties concerning client funds.

The Department contended in the Notice and Order for Hearing that in addition to withholding premiums, the Respondent had in one case filed a false insurance notification to the Department of Public Safety and forged a signature on the document; used the agency's bank account for his own personal use; and back-dated several insurance applications in order to create the false impression that coverage existed.<sup>[7]</sup> At the hearing, the Department elected to present evidence solely on the allegation that Respondent took premium payments and failed to forward them to the insurance companies; it presented no evidence that he filed a false insurance notice, forged a signature, used agency funds for his own personal use, or back-dated insurance applications. Nor did the Department offer any evidence of any statements or representations made by the Respondent (whether true or false) as to the terms of a contract or for the purpose of procuring premiums.

Consequently, the record is insufficient to support Count III (misrepresenting the terms of an actual or proposed insurance contract, in violation of Minn. Stat. §§ 60K.43, subd. 1(5); and Count IV (forging a document, in violation of Minn. Stat. § 60K.43, subd. 1(10)). Within these counts and in Counts V and VI, the Department has alleged violations of chapter 72A, including criminal misrepresentations, in violation of §§ 72A.03 and 72A.04, and willful criminal conduct, in violation of Minn. Stat. § 72A.02. Chapter

72A provides criminal penalties for these types of violations. The Administrative Law Judge has no authority to determine criminal guilt or innocence and expresses no opinion on whether criminal statutes have been violated.

K.D.S.

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<sup>[1]</sup> Testimony of Kevin Hardesty.

<sup>[2]</sup> *Id.*

<sup>[3]</sup> Testimony of Kevin Hardesty; see *also* Minn. R. 2975.1600.

<sup>[4]</sup> Ex. 1; Testimony of Martin Fleischhacker; Testimony of Kevin Hardesty.

<sup>[5]</sup> Minn. Stat. § 45.027, subd. 7(a)(2) & (a)(4).

<sup>[6]</sup> Minn. Stat. § 60K.43, subd. 1(4) & (8).

<sup>[7]</sup> Notice and Order for Hearing, January 6, 2005.